No. 93-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NADINE HURWITZ,

Petitioner,

—against—

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services; GERI MARTIN, as Associate Personnel Administrator of the New York State Department of Social Services; THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; and JAYMALA AMBEWADIKAR, as Associate Physician with the New York State Department of Civil Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because the New York Court of Appeals correctly applied the decisions of this Court, the petition does not present a conflict among the federal courts of appeals, and no important federal question is raised which should be settled by this Court.

Statement of the Case

A. Statement of Facts

As summarized in the decision of the New York State Court of Appeals under review (set out at pp. B-3–B-8 of Appendix B to the Petition ["Pet."]), petitioner Nadine Hurwitz was a tenured civil service employee at the respondent New York State Department of Social Services ("the State agency") when she went on voluntary disability leave on February 11, 1987, suffering from labyrinthitis. Under the first sentence of New York Civil Service Law ("CSL") § 73, the position of a person on voluntary disability leave may be held for her for up to a year. In December 1987, the State agency informed petitioner that she would be continued on sick leave until February 10, 1988, but would be terminated pursuant to CSL § 73 if she did not provide medical documentation of her fitness to work and actually return to work by then. In January 1988, petitioner submitted a letter from her physician which stated that petitioner was fit and "should" be able to return to work by February 3, but asked that she be allowed to return on a part-time basis with reduced responsibilities.

The State agency referred petitioner for a medical examination by the New York State Department of Civil Services' Employee Health Service. In that examination, the State doctor observed symptoms of active labyrinthitis. The doctor also reviewed medical reports from six other physicians submitted by petitioner. The doctor sent the State agency and petitioner her report of her findings and her conclusion that petitioner was not able to perform the duties of her position.[1]

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[1] Petitioner repeatedly argues that she had fully recovered and was physically fit to return when the State agency prevented her from returning based on the State physician's incorrect report that she was not fit. (Pet. 34 n. 2, 36-7, 42-3) The court below pointed out that the determination as to whether the State physician's report was correct is a matter for the posttermination hearing, not to be finally resolved at the pretermination stage. (Pet. B-11–B-12) That issue would therefore not be before this Court if review were granted. Respondents maintain, more-

Petitioner objected to the report and asked to appeal it. The State agency said there was no appeal process but that it would withhold further action in order to allow petitioner to present further evidence to and discuss the report with the State doctor. Petitioner and her treating physician discussed the report with the State doctor, who declined to reconsider her opinion or to reexamine petitioner.

Petitioner then discussed the report with the State doctor's superior, who said a second examination could be given if the State agency made a referral. Petitioner, however, had a severe recurrence of labyrinthitis symptoms and withdrew her challenge to the State doctor's report before being informed that the State agency was willing to refer her for a second examination. The State agency terminated her employment pursuant to CSL § 73 in April 1988.

Petitioner commenced a proceeding pursuant to New York Civil Practice Law and Rules Article 78 to review her termination. The trial court granted the petition, deeming that the failure to inform petitioner of her "right" to a second examination deprived her of a meaningful pretermination opportunity to be heard, and remanded the proceedings to the State agency.[2]

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over, that if the question were reached, they submitted abundant evidence below, based on the State physician's physical examination of petitioner and reports and testimony from petitioner's own physicians, that she was not medically fit to return to work when the State agency terminated her employment after more than one year's absence on disability leave. (*See* Record on Appeal, N.Y. Court of Appeals, Clerk of the Court, pp. 171, 174, 257-62, 300-1, 304, 306-7, 310-2, 319, 331-9, 349-50, 352, 375-6, 450-3, 464-5, 470-2, 476-8, 487-8, 499-502, 563-9, 570-1, 574-82, 584, 588-9, 594, 608-10, 755, 764, 765-7, 771, 772-86, 788, 793-8, 805)

[2] Petitioner's suggestion (Pet. 25-30) that the New York County Supreme Court's decision was upheld by the Appellate Division, First Department, is incorrect. As pointed out by the Court of Appeals herein, the lower court remanded for further proceedings before the State agency. (Pet. B-7) Petitioner's motion for reargument was denied by order entered July 10, 1990, and the Appellate Division, First Department, dismissed the appeal by order entered December 4, 1990. While that appeal

On remand, the State agency held a hearing and concluded that petitioner was not capable of performing her duties at the end of her year of excused disability leave. (Pet. G-3) It adhered to its decision to terminate her employment. (Pet. G-5–G-6)

Petitioner then commenced this second Article 78 proceeding. Because her papers challenged the substantiality of the evidence, it was transferred to the Appellate Division for review. That court remanded the proceeding for a second hearing pursuant to CSL § 73, this one to be directed to petitioner's *present* ability to perform her duties, not her fitness when terminated.

B. Decision of the New York Court of Appeals

The Court of Appeals reversed. After summarizing the facts, it reviewed its decisions and this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The court stated that under *Loudermill*, employees who are entitled to full posttermination evidentiary hearings need only be given, at the pretermination stage, an explanation of the grounds for the discharge and an opportunity to respond. (Pet. B-9, citing *Loudermill*, 470 U.S. at 546)

Applying those standards to the facts, the court found that petitioner received the required explanation of the reasons for her discharge, including a copy of the State doctor's report, and an opportunity to be heard.[3] The State agency not only dis-

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was pending, the administrative hearing on remand was concluded, and petitioner commenced this case under a separate index number, seeking review of the decision after hearing.

[3] The Court of Appeals thus held that the proper focus of pretermination review under the first sentence of CSL § 73 is the claimed basis of the discharge: that is, the employee's fitness at the end of the year of disability leave. (Pet. B-9–B-10) It rejected the Appellate Division's reading of the statute to allow consideration at that stage of the CSL § 73 process as to whether the employee had subsequently recovered. Consideration of present fitness is only allowed *after* an employee who has been terminated in accordance with the first sentence of CSL § 73 applies for reinstatement under the second sentence of that statute.

cussed the decision with petitioner on several occasions, it allowed her to submit her own medical evidence, to have her personal physician speak with the State doctor, and to discuss the underlying report herself with the State doctor and her superior, in an effort to persuade each that the report should be disregarded. The fact that petitioner was not informed before she withdrew her administrative appeal that yet additional opportunities to respond might be afforded her "does not diminish the adequacy of her opportunity to be heard for due process." (Pet. B-11) She was not entitled to a final resolution at the pretermination stage of the accuracy of the State doctor's report. As *Loudermill* had held, the pretermination procedure "need not definitively resolve the propriety of the termination" and is only to serve "as an initial check against mistaken decisions . . . ." (Pet. B-11–B-12, citing 470 U.S. at 545-6)

REASONS FOR DENYING THE WRIT

1. The Court Of Appeals' Decision Is Consistent With This Court's Decision In *Loudermill*

Petitioner asserts that the decision below is in conflict with this Court's *Loudermill* decision because, she alleges, she did not receive a "meaningful" opportunity to contest her dismissal. (Pet. 39). This claim, on its face, presents only a question of the extent to which the record supports the judgment below. Ordinarily, such an appeal does not present a question warranting this Court's review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In any event, the New York Court of Appeals' decision is consistent with the due process standards announced in *Loudermill*. Petitioner was terminated after receiving written notice of the basis on which that action might be taken and a preliminary opportunity to respond. She then received a medical examination and was sent a copy of the examination report, including the State doctor's medical findings and conclusion

that petitioner was not able to perform the duties of her position. Petitioner was told of her proposed termination in writing, with an explanation that the termination decision was based on the medical report's finding that she was not fit for duty.[4] Respondents reviewed petitioner's own medical evidence of fitness and listened to her objections to the State physician's report, and respondents even afforded petitioner an opportunity to attempt to convince the State physician to change the report. (Pet. B-10–B-11). The court below accordingly found on these facts that petitioner received the "notice and . . . opportunity to respond" that *Loudermill* requires. 470 U.S. at 545-6. No

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[4] Petitioner's claim that she was deprived of constitutionally sufficient notice that the State physician's report could lead to her termination (Pet. 36) is pled as a separate constitutional claim for the first time in this Court. Even if review of the claim were not barred by the failure to raise it below, *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970); Stern, Grossman & Shapiro, *Supreme Court Practice* at 364 (6th ed. 1986), it is factually meritless.

On December 10, 1987, respondents wrote to petitioner that "If you wish to return to work, you must provide medical documentation attesting to your ability to perform the duties of your position prior to your return. . . . A medical examination will be [then] conducted [by a State physician] and the employee must be certified as physically and mentally able to resume the full duties of his position. . . ." Quoting from the first sentence of Civil Service Law § 73 (set out at p. 8 n. 6 below), the letter warned that "[f]ailure to provide medical documentation . . . will result in your immediate termination under Section 73 . . . ." (Record on Appeal, N.Y. Court of Appeals, p. 132) After petitioner submitted documentation, respondents wrote to her that she was being referred for examination by a State physician "to determine your ability to perform the full duties of your position . . . . As has been previously indicated to you, you may not return to work until the results of your examination are received by us." (Record, p. 36)

She thus was told in writing in advance that she would be terminated unless she first provided her own documentation of medical fitness and then was certified as fit by the State physician. Those letters adequately informed her that the State physician's report could lead to her termination if she was not found medically fit.

substantial legal issue is presented on the record herein warranting this Court's review.[5]

Petitioner's claim that *Loudermill* was violated because she was not given some means of "contesting" the State physician's report is meritless. (Pet. 35-6) As noted, the record shows that petitioner was given three separate opportunities to contest that report: first when respondents accepted and reviewed petitioner's own medical evidence; second when they listened to her arguments against their reliance on the State physician's report; and third when they agreed to let petitioner speak with the State physician and present further evidence in an attempt to convince the doctor to change her report.

Furthermore, although *Loudermill* requires an opportunity to be heard, it does not suggest that the agency must provide an *pre*termination evidentiary hearing at which the accuracy of the facts, such as a doctor's report, can be "contested." Challenges to the accuracy of the facts are the subject of the *post*termination evidentiary hearing. (Pet. B-11–B-12, citing *Loudermill*, 470 U.S. at 545-6)

Because the petitioner had multiple opportunities to be heard—to present arguments for why the State physician's report should not be given weight, to submit her own medical evidence before and after the State doctor's examination, and to attempt to convince the State physician to change her report —, she was provided all the process due under *Loudermill*. The decision below thus properly stated the standards established by this Court in *Loudermill* and applied them correctly on this record. The petition, therefore, does not raise a substantial legal issue warranting this Court's review.

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[5] Although petitioner initially argues that *Loudermill* entitled her to a pre-termination hearing (Pet. 18), she later concedes that she was not entitled to a full evidentiary hearing (Pet. 20, 36), nor, indeed, to more than notice and an oppc-tunity to respond (Pet. 23, 37).

2. The Petition Does Not Warrant Review Inasmuch As It Seeks Review Of The Interpretation Of A State Statute By That State's Highest Court, Rendered In An Opinion That Offers An Adequate, Independent State Ground For Decision

Petitioner also argues that this Court should review whether the New York Court of Appeals properly interpreted the word "absent" in New York Civil Service Law ("CSL") § 73. (Pet. 47) Her argument is essentially based on the claim that the Court of Appeals' interpretation violated its own prior decisions concerning the statute. (Pet. 43-5). This Court defers to the high courts of the nation's states in interpreting their own states' statutes. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688-689 (1959). The proposed question therefore is not suitable for review.

Petitioner attempts to give her statutory interpretation question a constitutional veneer by alleging that the interpretation she says the statute was given, allowing the State agency to find her "absent" from work unless she passed a medical examination, violates due process. (Pet. 46). She argues that since the statute is intended to protect an employee's right to return to work after an extended voluntary absence due to disability, it violates procedural due process if the statute is used instead to furnish a procedure to render the employee eligible for termination. (Pet. 47)

The statute has, on its face, the purpose of defining when the State may terminate a tenured civil service employee absent on disability leave, as well as of protecting an absent disabled employee from premature termination.[6] Petitioner does not dis-

[6] The first sentence of CSL § 73 provides: "When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's [*sic*: workers'] compensation law, his employment status may be terminated and his position may be filled by a permanent appointment."

pute that respondents were entitled under CSL § 73 to require her to provide medical proof of her disability while she was absent due to a disability.[7] She cannot complain if the process which preserved her job during the period of disability, turned up medical evidence that she was still disabled and unfit to return after the period had expired.

The CSL § 73 process did not "create the basis for termination," as petitioner alleges. (Pet. 47) Rather, it revealed that the basis existed. Petitioner had notice of the purpose of the examination and its possible consequences. *See* p. 6 n.4 above. The fact that the examination could serve two purposes did not make it violative of procedural due process.

Independent of CSL § 73, petitioner was, in any event, subject to the general civil service requirement facing any employee who has been absent on sick leave, that of showing that she was medically fit to return to work without endangering her co-workers. 4 N.Y.C.R.R. § 21.3(e).[8] Petitioner has never challenged the constitutionality of that regulation or its application to her. There was thus an independent and adequate state ground for the decision below which precludes this Court's review.[9] *Florida v. Casal*, 462 U.S. 137 (1983); *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958).

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[7] Petitioner incorrectly alleges that CSL § 73 only allows a State agency to terminate an employee on a demonstration that the employee was continuously absent for over a year and was disabled "[t]hroughout that period of absence . . . ." (Pet. 42). In fact, the statute allows termination of a person, such as petitioner, who suffers from an episodic or intermittent disability, on a showing that the employee left due to disability and was absent for more than a year.

[8] The regulation provides: "The appointing authority may require an employee who has been absent because of personal illness, prior to and as a condition of his return to duty, to be examined, at the expense of the department or agency, by a physician designated by the appointing authority, to establish that he is not disabled from the performance of his normal duties and that his return to duty will not jeopardize the health of other employees."

[9] In the court below, respondents cited both CSL § 73 and 4 N.Y.C.R.R. § 21.3(e) as their bases for ordering the physical examination

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 1, 1993

Respectfully submitted,

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of petitioner that found her still disabled. The Court of Appeals approved of the referral without specifying if it was approving the referral under the statute, the regulation, or both. (Pet. B-4, B-10) Since petitioner did not challenge the regulation or its application, those issues were not briefed and cannot be reached here. *See* p. 6 n. 4 above, citing, *inter alia*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970). If the issues were reached, respondents assert that there is no substantive due process right to return to work for which one is not medically fit and that an employee absent on sick leave for a physical condition does not have a procedural due process right to a hearing before being required to present medical proof of fitness to return to work.